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IN THE

Supreme Court of the United States

October Term 1950

No. 568

BERT TAUNAH and PEAWIFEAH TAUNAH, *Petitioners,*

v.

H. C. JONES, Collector of Internal Revenue, *Respondent.*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioners, Bert Taunah and Peawifeah Taunah, respectfully pray for the issuance of a Writ of Certiorari to review the judgment below.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1). The judgment below was rendered January 2, 1951. (R. 68)

OPINIONS BELOW

The District Court did not render a formal opinion but entered Conclusions of Law. (R. 48). Neither the majority nor dissenting opinion of the Court below are reported but may be found in the record at R. 59 and R. 65, respectively.

QUESTION PRESENTED

Whether income derived from restricted allotted lands in Oklahoma, held in trust by the United States for full-blood restricted Comanche Indians, under trust patents which have not yet expired, is subject to Federal income tax.

STATUTES INVOLVED

The pertinent statutes are collected in the Appendix hereto, p. 15-17..

STATEMENT

Stipulated Facts:

The following facts were stipulated by counsel for both sides and found by the District Court (R. 6-14; 46-48):

Petitioners, Bert Taunah and his wife, Peawifeah, are full blood restricted Comanche Indians. (R. 6, 8, 46) Each has an allotment of about 160 acres of restricted lands. (R. 31, 29) Each also owns an interest in other restricted lands inherited from the original allottee. R. 29-31; 35-45) Title to all such lands is held in trust by the United States for each Petitioner. (R. 7-9, 14, 46-47) The original trust patents for these lands were issued to the original allottees by the General Land Office August 25, 1901. (R. 47) The trust period, originally 25 years,

has been extended by Presidential Executive Order (Appendix p. 17) and the extended trust period has not expired. (R. 14, 47) The lands were allotted to, or inherited by Petitioners from original allottees under the provisions of the General Allotment Act of February 8, 1887 (C. 119, 24 Stat. 388, 25 U. S. C. Sec. 331 et seq.) and the Jerome Agreement of 1892 ratified by Congress June 6, 1900. (C. 813, 31 Stat. 672 Sec. 6). (R. 12-13, 47)

During the taxable year 1946 Bert Taunah received $345 agricultural lease income; $360 oil and gas royalty income; $100 oil lease bonus and 40 cents interest, making a total income of $805.40. A deduction of $99 for percentage depletion on the oil and gas royalty income and bonus derived from restricted trust lands resulted in taxable income of $706.40. (R. 11, 47)

During the taxable year 1946 the wife, Peawifeah, received $195.56 agricultural and interest income; $25,239.99 oil and gas rentals and royalties, all of which except $22.46 came from her original allotment. A depletion deduction of 27-½%, or $6,941, was taken on the royalty income from the restricted trust lands resulting in taxable income of $18,494.55. (R. 10-11, 47)

The aggregate taxable income of husband and wife was $19,200.95 resulting in income tax of $3,950.42. (R. 48) Petitioners' income tax return for 1946 was prepared by an employee of the United States at the Southern Plains Agency, Anadarko, Oklahoma. (R. 11, 48) The tax payable on the return, $3,950.42, was deducted January 31, 1947 from Petitioners' individual Indian money accounts which were under the supervision and control of the Secretary of the Interior. (R. 11, 48) None of the above income was paid directly to Petitioners; it was all paid to the Indian Agency which acted for the Secretary of the Interior in deducting the amount of the tax and paying it over to the Collector of Internal Revenue. (R. 11, 48)

On April 26, 1948 Petitioners filed Form 843, a claim for refund, and after the six months waiting period (26 U. S. C. Sec. 3772 (2)) filed the present suit. (R. 4, par. 8)

The District Court for the Western District of Oklahoma gave judgment to Petitioners in the full amount (R. 53) and found the above facts (R. 46-48) which were stipulated by Respondent. (R. 6-14) The United States Court of Appeals for the Tenth Circuit reversed, one judge dissenting. (R. 59)

Basis of Decision of District Court:

In its Conclusions of Law (R. 48) the District Court held that the General Allotment Act of 1887 (25 U. S. C. Sec. 348; Appendix hereto, p. 15) provided that at the end of the trust period the land would be delivered to the allottee or his heirs "free of all charge or incumbrance whatsoever" (R. 48). Likewise the Jerome Agreement (C. 813, 31 Stat. 672, Appendix hereto p. 16) provided that at the end of the trust period the United States would convey the lands to the allottees or their heirs "free from all incumbrances" (R. 49). The trust patents issued to Petitioners (R. 35-45, 49) also provided that "at the expiration of said period the United States will convey * * * to said Indian, or his heirs * * * in fee, discharged of said trust and free of all charge or incumbrance whatsoever." (R. 49; see trust patents R. 35, 37, 39, 40, 42, 43, 45.) The Court pointed to *U. S.* v. *Rickert*, 188 U. S. 432, 438, as indicating that freedom from incumbrance of necessity meant freedom from taxation and that four years after the *Rickert* decision the General Allotment Act was amended (25 U. S. C. Sec. 349) to provide that when the Secretary of the Interior determines an Indian is competent he may issue a patent in fee simple "and thereafter all restrictions as to sale, incumbrance or *taxation* of said land shall be removed". (R. 49) The Court also cited the Act of February 10,

1942, C. 56, Sec. 1, 56 Stat. 87, 25 U. S. C. Sec. 352(c) providing that where the Secretary issued a patent in fee simple without the consent of the allottee and the land became prematurely subject to taxation, the Secretary was authorized to reimburse the allottee for taxes paid by the Indian on the land during the unexpired trust period. (R. 49.) Likewise the Court cited the Act of January 29, 1942 56 Stat. 21-22, wherein Congress tolled the Statute of Limitations to allow refund claims to Indians for Federal income taxes "erroneously or illegally" paid upon "rents, royalties or other gains arising from * * * lands" which "by the terms of said treaty or agreement were exempted from taxation". (R. 50.)

The Court based its decision squarely upon its holding that Congress intended that this allotted land should be free from all tax burdens. (R. 50) It cited *Oklahoma Tax Commission* v. *U. S.*, 319 U. S. 598, 610, which held in the case of Indians of the Five Civilized Tribes that the 160 acres of allotted land were by statute immune from Oklahoma estate taxes although the same opinion held other Indian lands were not. (R. 50) Also it cited *Superintendent* v. *Commissioner of Internal Revenue*, 295 U. S. 418, 420, holding that restricted Indians' *investment* income was taxable and "homesteads only were definitely excluded". (Op. p. 420) *Choteau* v. *Burnet*, 283 U. S. 690, 692 did not deal with individual allotted lands but with shares of general tribal income. (Op. p. 692; R. 50) The Court cited *Carpenter* v. *Shaw*, 280 U. S. 363, wherein this Court held that oil and gas royalties were rights attached to the land[1] (Op. p. 368) and that while statutes conferring tax exemptions were to be strictly construed,

[1] The District Court below held that although royalty income was "income" for Federal income tax purposes, oil and gas royalties "nonetheless are corpus as a matter of general property law and hence it must follow that to tax *this* royalty is to tax the tax-exempt land itself. Cf. *Parker* v. *Riley*, 250 U. S. 66, 70."

just the opposite was the rule as to Indian treaty stipulations (Op. p. 366-367). The Court likewise relied on lower court decisions in *U. S.* v. *Homeratha*, 40 F. (2) 305 and *Pitman* v. *U. S.*, 64 F. (2) 740.[2] (R. 51)

Finally the Court held that the tax exemption, which was protected by the Fifth Amendment (*Choate* v. *Trapp*, 224 U. S. 665, 678) was not given these Indians gratuitously but as a result of "a somewhat coercive bargaining transaction" under which the Indians gave up their vast communal lands.[3] "Doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation", as this Court said in *Carpenter* v. *Shaw*, 280 U. S. 363, 367. (R. 52) The Court concluded:

> "This is not a question of conferring a tax exemption by implication, but instead, a question of delimiting the proper scope of a tax exemption the existence of which has long been decisively determined. *U. S.* v. *Rickert, supra.*" (R. 52)

Basis of Reversal by Court of Appeals:

The United States Court of Appeals for the Tenth Circuit reversed by a divided Court (Judges Bratton and Huxman), Judge Phillips dissenting. The majority held that Sections Sec. 11, 21-23 of the Internal Revenue Code (26 U. S. C. A. 1946 ed. Sec. 11, 21-23) were broad enough to include income from restricted allotted Indian lands held in trust by the Government (R. 60) and that exemptions from federal taxation could not rest upon implication, citing *The Cherokee Tobacco*, 11 Wall. 616, 620; *U. S. Trust Co.* v. *Helvering*, 307 U. S. 57; and *Oklahoma Tax Com.* v. *U. S.*, 319 U. S. 598. The Court stated the

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[2] To which *Blackbird* v. *Commissioner*, 38 F. (2) 976, might have been added.

[3] Reminding us of the old frontier jibe: "Here's to the Indians, to whom we owe absolutely nothing except the land the United States is located on".

provisions of the General Allotment Act (25 U. S. C. Sec. 331, 348, 349) and the Jerome Agreement, 31 Stat. 676 could be searched in vain for a provision expressly exempting the present Indian lands from taxation. (R. 61) The Court conceded that such lands were immune, under *U. S.* v. *Rickert,* 188 U. S. 432, and other cases, from State *ad valorem* taxes and that no case existed holding that the present lands were subject to Federal income taxes. (R. 62) However the Court held this Court's decision in *Choteau* v. *Burnet,* 283 U. S. 691, charted its course and that what was not expressly exempted was taxable. The Court likewise relied upon *Superintendent* v. *Commissioner,* 295 U. S. 418, *Oklahoma Tax Com.* v. *U. S.,* 319 U. S. 598, and *Landman* v. *Commissioner,* 123 F. (2) 787, as indicating it was "fairly clear" that Congress intended to tax income from restricted allotted Indian lands held in trust. (R. 63, 64)

Basis of Dissenting Opinion (Judge Phillips):

Judge Phillips drew a distinction between *allotted* lands held in trust and *inherited* lands held in trust. The latter he held taxable on the theory that the right to inherit is a mere privilege which the United States can take away. (R. 67) As to the originally allotted lands, he cited *U. S.* v. *Rickert,* 188 U. S. 432, 438, to the effect that if these lands could be taxed, and inferentially sold for taxes, the United States could not fulfill its obligations as trustee or guardian. Cf. *Chouteau* v. *Commissioner,* 38 F. (2) 976. (R. 66-67)

Also, the dissent held that oil and gas being irreplaceable natural resources, had the United States not permitted their removal, it would have been obligated to convey them *in situ* at the end of the trust period. Exchanging them for cash did not destroy the obligation to transfer the land undiminished at the end of the trust period in accordance with the Jerome Agreement, 31

Stat. 676. The dissent held the obligation of the United States to convey the original allotment undiminished at the end of the trust period could not lawfully be changed and that to do so would impair the contract. (R. 67)

SPECIFICATION OF ERRORS TO BE URGED

The white man's contracting circle has left the Comanche only their homesteads, restricted allotted lands held by the United States for the Indians in trust. Income from such lands, including their homestead lands, is by statute and treaty exempt from Federal income tax.

REASONS FOR THE ALLOWANCE OF THE WRIT

1. Whether income from restricted allotted Indian lands held in trust by the United States for incompetent full-blood Comanche allottees or their heirs is subject to Federal income tax is an important question of Federal law which has not yet been but should be decided by this Court. *Superintendent* v. *Commissioner,* 295 U. S. 418, 421 involved investment earnings on *surplus* income; *Choteau* v. *Burnet,* 283 U. S. 691 involved *tribal* income received by Indians already declared competent. Neither is controlling authority here at the Court below admitted. (R. 62) Up until 1947 no effort was made by the Commissioner of Internal Revenue to assess or collect ordinary income taxes. However, in that year, by joint action of the Bureau of Internal Revenue and the Commissioner of Indian Affairs, returns were prepared in the Western Oklahoma Agency and filed with the Collector. The superintendent of the agency paid the taxes involved. (R. 11) The present suit for refund of the tax is a test case authorized by the Commissioner of Indian Affairs. (R. 2) It is ideal for that purpose involving as it does (a) oil and gas income both from lands originally allotted and lands inherited from original allottees, and (b) agricultural and interest income from such lands.

The unsatisfactory result of the case at this time is that the district and circuit judges of the Tenth Circuit are divided two and two on the question of taxability of the income involved. Also, the decision below is binding only in the Tenth Circuit and the Secretary of Interior holds in trust restricted allotted Indian lands located in many States outside that Circuit. Other Federal courts might readily follow the reasoning of such cases as *Homeratha* v. *U. S.*, 40 F. (2) 305, *Blackbird* v. *Commissioner*, 38 F. (2) 976, 977-8, or the dissenting opinion below.[1] Until an authoritative decision by this Court the Indians will be compelled to file thousands of refund claims to protect themselves with resulting burdens on the Bureau of Internal Revenue, the Bureau of Indian Affairs and the Courts.

2. The ultimate question is whether the General Allotment Act, 25 U. S. C. Sec. 347, and the Jerome Agreement, 31 Stat. 672, placed in their proper historic background, exempt the present type of income from income tax. The Act requires conveyance of the land in fee to the Indian or his heirs "discharged of said trust and free of all charge or incumbrance whatsoever." The Jerome Agreement contains similar wording and requires conveyance in fee simple "to the allottees or their heirs, free from all incumbrances."[2] The Court below refused to give these guarantees the construction laid down by this Court in

[1] *Blackbird* v. *Commissioner, supra,* was not overruled in *Superintendent* v. *Commissioner,* 295 U. S. 418, 420, insofar as income from homestead or allotted lands was concerned. This Court simply held that income from *investments* of surplus income was taxable. (See opinion p. 418-9; 421)

[2] As the guarantee of both the Act and the Jerome Agreement covers *heirs* as well as original allottees we are unable to follow the distinction in the dissenting opinion below holding that as to lands *inherited* the door is open to taxation on the theory that the right to inherit is a privilege and may be withdrawn. If the guarantee means what Petitioners claim it does the Government could not legally withdraw the privilege to the extent of taxing the heirs. (Cf. *Choate* v. *Trapp,* 224 U. S. 665)

Carpenter v. *Shaw*, 280 U. S. 363, 367, wherein this Court stated:

> "While, in general, tax exemptions are not to be presumed and statutes conferring them are to be strictly construed (Heiner v. Colonial Trust Co., 275 U. S. 232, 72 L. ed. 256, 48 Sup. Ct. Rep. 65), the contrary is the rule to be applied to tax exemptions secured to the Indians by agreement between them and the national government. Choate v. Trapp, supra (224 U. S. 675, 56 L. ed. 945, 32 Sup. Ct. Rep. 565). Such provisions are to be liberally construed."

Instead of the above rule the Court applied the principle of tax law that exemptions from Federal taxation cannot rest upon implication. There is an obvious conflict between the Court's decision below and this Court's rule of liberal construction of Indian tax exemptions as to *allotted* lands announced in *Carpenter* v. *Shaw*, 280 U. S. 363, 367 and *Choate* v. *Trapp*, 224 U. S. 665, 675.[1]

3. The rule of liberal construction cannot be defeated by the Government's contention below that the meaning of the exemption clauses in the General Allotment Act and the Jerome Agreement was irrelevant as the present tax was a tax on "income" and not on the land itself, citing *New York ex rel. Cohn* v. *Graves*, 300 U. S. 308, 314-316. This is hardly an answer as it is elementary that an unpaid income tax becomes a lien on the land and hence is certainly a "charge" or an "encumbrance". (Cf. *U. S.* v. *Rickert*, 188 U. S. 432, 438) As to this, the Government answered below that there would never be any unpaid taxes as the Secretary of the Interior, the trustee, would simply debit his ward's restricted account

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[1] In *Oklahoma Tax Com.* v. *U. S.*, 319 U. S. 598, 606, this Court said it had applied the rule against tax exemption by implication to Indians as well as others, citing *Superintendent* v. *Commissioner of Internal Revenue*, 295 U. S. 418, 420. However, the latter case involved investment income from withheld funds and the Court stated "homestead lands only were definitely excluded". (p. 420)

and credit the account of the Collector of Internal Revenue. This makes *vis major*, the accident of guardianship, without regard to its duties, the test of legality. Also it ignores the fact that pursuant to the Government's announced policy as outlined in its own regulations Indian allottees declared competent can make their own leases of restricted trust lands and collect their own rent. (See 25 Code Fed. Reg. Secs. 171.4, 171.2.) Hence tax liens could readily arise.

If as held in *U. S.* v. *Rickert*, 188 U. S. 432, 438, a state tax on restricted allotted Indian lands is invalid because the tax may become a lien and thus prevent the United States conveying the land to the Indian "free of all charge and encumbrance whatsoever" the same should be true of a lien in favor of the Collector of Internal Revenue.

Finally, under Oklahoma law royalty oil and gas brought to the surface impairs and diminishes the fee and constitutes a conversion of the fee *pro tanto* (*Aldridge* v. *Houston Oil Co.*, 118 Okla. 281; 244 Pac. 782, 784; cf. *Parker* v. *Riley*, 250 U. S. 66, 70). In place it is corpus and part of the trust estate. (*U. S.* v. *Noble*, 237 U. S. 74, 80; *Parker* v. *Riley*, 250 U. S. 66, 70; R. 52). Hence any diminution by taxation is an impairment of the land held in trust. The fact that Federal tax laws treat oil and gas royalties as income for tax purposes does not of course mean they are not part of the trust estate under the General Allotment Act. The 27½% tax allowance for depletion is a mere act of legislative grace (*Anderson* v. *Helvering*, 310 U. S. 404, 408, *In re Levy*, 94 P. (2nd) 539); each Congress threatens to repeal it. (4 *Mertens Fed. Inc. Tax*, Sec. 24.06-24.15). Also it is an arbitrary figure and does not pretend to be the exact equivalent in value of the oil and gas. The very *taxes* collected today might equal the entire value of the lands at the time the United States decides to return them to the Indians.

4. The decision below imputes to Congress an inconsistent policy as to tax exemption of restricted allotted Indian lands. In *Oklahoma Tax Commission* v. *U. S.*, 319 U. S. 598, 610, although there was a broad holding of taxability, this Court held that under non-taxable provisions in the Act of May 10, 1928, 45 Stat. 495, C. 517, certain *restricted allotted* lands of the Five Civilized Tribes were immune from Oklahoma estate taxes. Presumably they are likewise immune from Federal income taxes,[1] unless the Government's contention is approved that "income" from allotted lands is taxable even though the land is not. Similar non-taxable provisions covering Indian lands are embraced within the Acts of July 1, 1898, 30 Stat., C. 542; March 1, 1901, 31 Stat. 861, C. 676; June 30, 1902, 32 Stat. 500, C. 1323; April 16, 1906, 34 Stat. 137, C. 1876; April 17, 1937, 50 Stat. 68, C. 108 (319 U. S. 607, footnote 11.) Thus restricted allotted lands of the Five Civilized Tribes and Quapaws covered by the above statutes will go income-tax free as to agricultural income whereas similar Comanche lands will be taxed. While Governmental policy can, of course, vary from tribe to tribe, depending on the degree of civilization and competency attained, or for other reasons, there is no rational basis for discrimination as to Federal income taxes—a discrimination which favors the competent tribes, as distinguished from the less competent. There is no reason why, as a result of varying judicial decision, particular tribes should attain this favored position. The Commissioner of Indian Affairs should not be required to assume the burden of paying certain taxes, and not paying others, until this Court decides the matter.

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[1] At least as to *agricultural* income, mineral income being taxable under Sec. 3 of the Act above cited.

CONCLUSION

It is respectfully submitted the writ should be granted and the judgment below reversed.

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